

STATUTORY DAMAGES AND THE CONDITIONAL SALE

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With the possible exception of the marriage contract, few agreements are entered into today with more enthusiastic anticipation of enjoying the benefits of the contract and less concern about how they are to be paid for than the conditional sale contract. The Federal Reserve Board statistics when combined with the Census Bureau population estimates show that the average American family has an annual income of \$5,000 before taxes and owes no less than \$1,000, excluding a \$5,000 real estate mortgage. Nearly three-fourths of the \$1,000 indebtedness is being paid off on the instalment plan.¹ A national magazine recently quoted a small town banker's observations on the changing mores of Americans thusly: "Installment buying continues to be a way of life with most Americans. . . . People borrow to finance anything they can—washers, TV's, dryers, cars. I don't see how in the world they keep up their payments."²

Some of them don't.³

What happens to the conditional buyer when he cannot meet his payments? The great bulk of statutory regulation of damages in conditional selling has centered around adjusting the rights of parties upon default by the conditional vendee. But a meaningful evaluation of legislative control of damages in conditional sales calls for a broader canvass; consideration must be given to the whole arsenal of statutory rights and remedies provided for the defaulting buyer and his conditional seller. The following discussion of statutory damages in conditional sales treats of the full range of legal relations between conditional vendor and defaulting vendee. The common-law background and the standard conditional sale form contract are viewed prior to examination of the statutes regulating damages in this area.

COMMON-LAW REGULATION OF DAMAGES IN CONDITIONAL SALES

Under the simplest form of conditional sale contract, wherein the

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¹ Lowry, *In Debt? It's the American Way to Keep the Economy Booming*, Champaign-Urbana News Gazette, Apr. 12, 1959, p. 1, col. 6.

² *The Changing Mood of America*, U.S. NEWS & WORLD REPORT, May 11, 1959, pp. 46, 52.

³ Some indication of the default rate is the percentage of repossessions. In 1937 and 1938 the number of used cars repossessed by sales finance companies ran as high as twenty per cent of the number financed annually; in the same years the percentage of new cars repossessed was more than six per cent. In 1955, about eleven per cent of the used cars financed annually were repossessed, and for new cars the percentage was two and one-half. These statistics may be found in FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS, CONSUMER INSTALMENT CREDIT pt. I, vol. 1, at 81 (1957) [hereinafter cited as FEDERAL RESERVE REPORT]. It should be remembered that there are many more delinquencies than there are repossessions due to the reluctance of retailers and finance companies to repossess.

seller reserves title and the right to repossess, the common law gives the conditional vendor two remedies upon default of the vendee. He can retake possession of the chattel or he can sue the buyer for the price. The question whether these are exclusive or cumulative remedies is considered in the ensuing discussion. A seller in the ordinary contract for the sale of goods cannot recover the price unless title has passed to the buyer.⁴ The anomaly of allowing a conditional vendor who has expressly reserved title in himself to sue for the full price, and thereby to vest title in the buyer, has been justified on the ground that the essential incidents of title have already been transferred to the buyer—possession with the right to use the goods and risk of loss.⁵

A host of problems may attend a default by the conditional buyer. If the seller chooses to sue the buyer for the contract price when the buyer defaults, can he later repossess before the judgment is satisfied? If the seller adopts repossession as his first remedy: (1) Does the buyer have the right to redeem the goods? (2) Does the buyer have the right to recover the payments he has already made? (3) Does the seller have the right to recover from the buyer any deficiency due after the seller has resold the goods and applied the proceeds of the sale to the balance? (4) Must the seller account to the buyer for any surplus remaining after the goods have been resold and the proceeds applied against the balance?

Decisions considering these questions have suggested that the determination of some of them depends upon whether the conditional seller's act of repossessing goods from a delinquent buyer is to be considered a rescission. Hence, for purposes of deciding whether a repossessing seller can hold the buyer for any remaining deficiency, the general rule is usually stated to be that, in the absence of contrary contractual or statutory provisions, repossession constitutes rescission of the contract.⁶ It is said to follow from this that the seller is debarred from any subsequent recovery of the unpaid balance of the price.⁷ On the

⁴ UNIFORM SALES ACT § 63.

⁵ 2 WILLISTON, SALES § 333 (rev. ed. 1948).

⁶ 3 WILLISTON, SALES § 579(b) (rev. ed. 1948).

⁷ See *Noble Gill Pontiac v. Bassett*, 297 S.W.2d 658 (Ark. 1957) (court denies seller right to recover a deficiency from buyer after repossession even though contract provision clearly gave seller right to do so; court states that when seller repossessed he canceled the contract); *General Motors Acceptance Corp. v. Driver*, 188 Ark. 88, 64 S.W.2d 87 (1933); *Dasher v. Williams*, 30 Ga. App. 122, 117 S.E. 108 (1923) (election to take property defeats any subsequent action for any further recovery); *Perkins v. Grobben*, 116 Mich. 172, 74 N.W. 469 (1898) ("The vendor is not entitled to the title and possession of the property, and to be paid for it also."); *Stemline v. C.I.T. Corp.*, 186 Minn. 384, 243 N.W. 708 (1932); *Oregon Motor Co. v. Carter*, 123 Ore. 215, 261 Pac. 691 (1927) (seller not entitled to deficiency unless contract so provides); *Singer v. Millard*, 171 Wis. 637, 177 N.W. 893 (1920) (remedies of repossession and suit for price inconsistent). See also *James v. Allen*, 23 Cal. App. 2d 205, 72 P.2d 570 (1937) (repossessing seller barred from suing for deficiency even though contract seems to give him right to do so).

other hand, if the vendor elects to bring an action for the price instead of repossessing the goods, he is held to have vested title in the buyer and to have relinquished the right to retake the goods later.⁸ The result is a regime of exclusiveness of remedy.

Cases enunciating these rules fail to offer any cogent reasons why a seller acting under an express term of the contract in retaking a chattel from a defaulting buyer necessarily rescinds the contract and bars himself from recovery of the price due under the agreement. When courts do attempt to justify the election of remedies rule they usually do so on conceptualistic grounds. For example, it has been stated that the buyer's promise to pay the purchase price and the seller's obligation to transfer title are mutual, concurrent conditions; thus the seller's repossession disables him from passing title to the buyer and excuses the latter from any duty to perform.⁹ A variation of this is the assertion that when the seller retakes possession of the goods there has been a failure of consideration for the buyer's promise to pay.¹⁰ Metaphor was employed by one court in declaring: "When the seller retakes possession of the property he *looks* to the property and not to the buyer."¹¹ These statements, together with the view sometimes expressed that title to an article in the seller is "inconsistent" with an action to recover the debt due for its purchase,¹² seem little more than restatements of the exclusiveness of remedies doctrine rather than compelling justifications for the rule.

Conspicuous by its omission in cases endorsing the doctrine of exclusiveness of remedies is any attempt by the courts to put forth a rational policy basis for the rule. If there is any legitimate policy objective or social goal furthered by withholding the right to sue on the

⁸ See, e.g., *Holt Manufacturing Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435 (1895) (remedies of suit for price and repossession are inconsistent); *Martin Music Co. v. Robb*, 115 Cal. App. 414, 1 P.2d 1000 (1931); *Galion Iron Works v. Service Coal Co.*, 264 Mich. 298, 249 N.W. 852 (1933) (suit for price even though dismissed before judgment bars suit for repossession). Cf. *Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 Pac. 451 (1919) (if seller only sues for some past due instalments, he is not precluded from subsequent repossession). *Contra*, *In re Steiners Improved Dye Works*, 44 F.2d 557 (7th Cir. 1930) (UNIFORM SALES ACT § 20 relied on to avoid election of remedies doctrine). See 3 WILLISTON, SALES § 571 (rev. ed. 1948); Glenn, *The Conditional Sale at Common Law and as a Statutory Security*, 25 VA. L. REV. 559, 570 (1939): "But if the vendor, instead of retaking the goods, chooses to sue for the purchase price, does he not thereby look to the purchaser's general credit, with the result that the purchaser, already in possession of the property, now holds it as owner?"

⁹ *International Harvester Co. v. Bauer*, 82 Ore. 686, 162 Pac. 856 (1917) (But in this case an express agreement on the part of the buyer to pay any deficiency was enforced).

¹⁰ See 3 WILLISTON, SALES § 579(c) (rev. ed. 1948).

¹¹ *Haubelt v. Bryan & Doyle*, 43 P.2d 68, 70 (Okla. 1935).

¹² *Haubelt v. Bryan & Doyle*, 43 P.2d 68 (Okla. 1935); *Singer v. Millard*, 171 Wis. 637, 177 N.W. 893 (1920).

contract debt from a seller who has retaken possession, it is not enunciated in the appellate opinions.

Another major principle in the doctrinal structure regulating the rights of conditional sellers and buyers, *intersese*, concerns the disposition to be made of sums paid by the buyer to the seller at the time of default. In the absence of statute and when the contract is silent on the matter, the majority common-law rule is said to be that the seller may retain all sums the buyer has paid in even though the seller has repossessed the subject matter of the sale.¹³ Cases espousing this rule of forfeiture often state that repossession is *not* a rescission of the contract; therefore, the seller is entitled to retain the sums paid in on the contract by the buyer.¹⁴ It is noteworthy that the two doctrines usually said to be the general common-law rules—(1) that after repossession the seller cannot recover from the buyer any balance due, and (2) that the buyer may retain sums paid in on the contract—are diametrical opposites on the issue of rescission. The repossessing seller is said not to be allowed to recover the remainder of the price due on the contract because he ended the contract by the repossession. Conversely, the delinquent buyer finds that money he has paid in on the contract is forfeited because the seller's act of repossession does *not* terminate the contract.

The common-law rule on forfeiture has been approved in the following words:

We are satisfied that the great weight of authority, as well as of reason, is to the effect that in an action at law, the vendee cannot recover such payments where he is the party in default. To allow that he might do so would lead to startling results. This may be illustrated by the effect on the parties to a conditional contract of the purchase and sale of the land on installments. The vendee might make such a purchase for speculative purposes and on a failure to make a profitable sale of the property depreciating or failing to increase the value, he might default and recover all sums paid, at most only deducting the rental value of the premises. This would result in the contract not serving the purpose for which it was in-

¹³ See *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666 (1898); *Latham v. Sumner*, 89 Ill. 233 (1878); *Frazier v. Allison*, 315 Ill. App. 253, 42 N.E.2d 967 (1942); *Wahrer v. O'Connor*, 204 Ill. App. 330 (1917); *Branstetter Motor Co. v. Silverberg*, 140 Ill. App. 451 (1908); *Livingstone v. Havens*, 191 Minn. 623, 255 N.W. 120 (1934). See 3 WILLISTON, SALES § 579(c) (rev. ed. 1948).

¹⁴ "There is no rescission of the contract requiring the vendor to place the vendee in status quo, but the taking is in accordance with the contract and the vendor is not liable to refund payments made to him." *Frazier v. Allison*, 315 Ill. App. 253, 259, 42 N.E.2d 967, 969 (1942). See also the *Latham* and *Livingstone* cases cited in note 13 *supra*.

tended, but, on the contrary, becoming a shield for the vendee by means of which he could take contracts for land, hold them for a rise, and, on failure to realize a profit, surrender them and recover all sums paid, thus making the vendor take all the chances; the vendee being bound by nothing. As is said by one authority, it would be offering a bounty for a violation of contracts.¹⁵

In addition to this theory, an occasional statement can be found in the cases attempting to justify forfeiture on the ground that one in default under a contract should not be allowed to enforce any rights under it.¹⁶

A problem related to the two discussed above concerns the situation where a buyer has paid in a substantial amount of the price of an article before default and the seller has repossessed and resold the article receiving therefrom an amount of money greater than the sum necessary to cover the remaining balance owned by the buyer on the contract. Must the seller after paying the expenses of repossession and resale return to the buyer the surplus? Under the theory that repossession terminates the contract, it would seem that the seller might keep the profit made on a resale. After repossession the seller would be looked upon as absolute owner of the chattel and entitled to any benefits derived from the resale thereof.¹⁷

To add to the melancholy position of the conditional vendee at common law, it should be said that the buyer was usually not allowed to redeem his chattel after the seller or holder of the contract had repossessed it.¹⁸

Perusal of the cases indicates that the statements set forth above as the general common-law rules are not as well followed in the decisions as the textbooks and some opinions would have one believe. Substantial case law can be found granting the conditional vendor the right to hold a vendee for the deficiency remaining after repossession

¹⁵ *Pfeiffer v. Norman*, 22 N.D. 168, 173-74, 133 N.W. 97, 99 (1911).

¹⁶ "A buyer who, without lawful excuse, refuses to go forward with his contract is not entitled to recover back money paid on account thereof." *Rayfield v. Van Meter*, 120 Cal. 416, 418, 52 Pac. 666 (1898). See also *Enterprise Distributing Corp. v. Zalkin*, 154 Ga. 97, 113 S.E. 409 (1922).

¹⁷ "In matters of conditional sale the law seems to be that if the condition of payment is not fully complied with or waived, the original vendor's rights become perfect and absolute. . . ." *Frazier v. Allison*, 315 Ill. App. 253, 258, 42 N.E.2d 967, 969 (1942). See also *Branstetter Motor Co. v. Silverberg*, 140 Ill. App. 451 (1908), wherein the seller was apparently allowed to enjoy a surplus.

¹⁸ See *Bagnard v. Interstate Finance Corp.*, 229 Iowa 452, 294 N.W. 790 (1940); *Newport Motor Sales, Inc. v. Bove Chevrolet, Inc.*, 84 R.I. 195, 122 A.2d 167 (1956); *Fausett v. General Electric Contracts Corp.*, 100 Utah 259, 112 P.2d 149 (1941). But see *J. D. Pittman Tractor Co. v. Bolton*, 238 Ala. 300, 191 So. 360 (1939); *Watkins v. Carter*, 267 Ky. 241, 101 S.W.2d 932 (1937).

and resale.¹⁹ Moreover, an impressive number of cases allow the defaulting conditional buyer the right to have restored to him money he has paid in on the contract, less some compensation to the seller for use of the chattel.²⁰

And well might the so-called majority common-law rules be departed from. Their legalistic justification is weak and their actual application may lead to arbitrary and unjust results. Denial to the conditional vendor of recovery for the unpaid balance of the price remaining after the proceeds of resale have been applied thereon simply deprives the vendor of his bargain. He has retained title, normally with an express right of repossession in case of default, and the buyer has agreed to pay the price. It does not seem necessarily inconsistent to allow a seller who has retained a security title to retake the chattel security and sue for the remaining balance due. Quite probably it is a just rule that one rescinding an agreement cannot claim benefits under the contract. But it is difficult to perceive the wisdom of a legal rule, which, by labeling the seller's act of repossession a rescission, serves to deprive the seller of the buyer's promise to pay the price, when the very act of repossession is normally provided by the contract. It may certainly be contended that the seller is not rescinding by repossessing but is claiming a right granted by the contract.

The numerous decisions departing from the principle that a defaulting conditional vendee forfeits money paid in are indicative of a growing trend of judicial displeasure with this hard rule. The argument by proponents of the forfeiture rule that allowing a defaulting vendee to retake money paid in amounts to a "bounty for a violation of contracts" is manifestly specious. The spectacle of one purchasing a chattel on conditional sale with the intent of holding such an article for speculation, thus paying off the balance of the price if the market rises but defaulting and taking his money back from the repossessing seller if the value falls, is so fanciful in the contemporary commercial context

¹⁹ For an able, convincing argument to the effect that repossession should not bar subsequent recovery of a deficiency, see *Mercier v. Nashua Buick Co.*, 84 N.H. 59, 146 Atl. 165 (1929). See also *General Motors Acceptance Corp. v. Brown*, 2 Cal. App. 2d 646, 38 P.2d 482 (1934); *Jeanson v. Zangel*, 119 Cal. App. 692, 7 P.2d 314 (1932); *Horvitz v. Leibowitz*, 274 Ill. App. 196 (1934); *Osgood Co. v. Wilkinson*, 265 N.Y. 70, 191 N.E. 779 (1934); *International Harvester Co. v. Bauer*, 82 Ore. 686, 162 Pac. 856 (1917).

²⁰ *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004 (1912); *General Motors Acceptance Corp. v. Coggins*, 178 Ga. 643, 173 S.E. 841 (1934); *Enterprise Distributing Corp. v. Zalkin*, 154 Ga. 97, 113 S.E. 409 (1922); *Bray v. C.I.T. Corp.*, 179 S.E. 925 (Ga. App. 1935); *Sterchi Brothers Co. v. Harris*, 47 Ga. App. 772, 171 S.E. 457 (1933); *Sears, Roebuck & Co. v. Higbee*, 225 Ill. App. 197 (1922); *Quality Clothes Shop v. Keeney*, 57 Ind. App. 500, 106 N.E. 541 (1914); *Thomas v. Phillip Werlein Ltd.*, 181 La. 104, 158 So. 635 (1935).

as to require little comment. In this age of planned obsolescence of consumer goods, with the resultant rapid depreciation, one simply does not buck the high carrying charges involved in instalment buying to buy a chattel for purposes of speculation.

Both the election of remedies principle and the forfeiture rule are subject to the same basic criticism: they are too blunt and imprecise for the accurate adjustment of the competing claims of the parties in the complex area of damages in conditional sales cases. It is possible that a repossessing seller may be able to resell a chattel at a price that will roughly equal the balance the buyer owes on the article, plus the cost of repossession and resale, thus leaving neither overage nor deficiency. In such a case the rule restricting the seller to alternative remedies—repossession or action for price—yields a just result. In like manner, the forfeiture rule operates fairly where the money paid by the buyer to the seller subject to forfeiture equals the sum of the depreciation and rental value of the chattel during the time it was in the buyer's possession. Even a stopped clock is right twice a day. However, the factual probabilities of either of these cases occurring are so patently remote as to indict these rules of law as being arbitrary to the point of caprice.

The election of remedies doctrine that denies the repossessing seller a deficiency judgment may have as its unspoken policy basis the legitimate object that a conditional vendor should get but one satisfaction on his debt. Yet, in barring the seller from what appears to be a double remedy, the courts sometimes deny him even one satisfaction of the claim to which he is properly entitled. The probable policy directives underlying the forfeiture rule are not set forth in any recognizable form in appellate decisions and are so obscure as to make responsible conjecture about them exasperatingly difficult. Whatever social goal the courts have been trying to achieve by the forfeiture rule—whether it be some primitive attempt to prevent the defaulting buyer from being unjustly enriched—one can only say that the doctrine is, at best, an erratic, inexact tool for adjusting the rights of parties, and, at worst, a rule which is subject to vicious abuse in cases where buyers have paid in large percentages of the contract price at the time of default. It is true that in the field of consumer goods depreciation is rapid, and this factor, together with the value of the defaulting buyer's use of the article, should be weighed in determining the seller's damages. But the meat-ax approach of the forfeiture rule is not warranted by these considerations. In an age when "buy-now-pay-later" has transcended the slogan stage to become virtually the national economic motto, buyer overcommitment in instalment sales is a problem worthy of the most serious attention our administration of justice can provide. Certainly the defaulting buyer should be entitled to a judicial determination which would, in adjudicating his rights, weigh such factors, *inter alia*, as the amount of depreciation of the article, value of use by the buyer, amount buyer paid in, and amount obtained by seller on resale.

INDUSTRY SELF-REGULATION BY CONTRACT

The twentieth century has seen a most significant change in the economic habits of the American consumer. There has been a pronounced trend toward consumer ownership of the assets that afford transportation, household services, and recreation, as distinguished from purchasing these services from others. That tremendous expansion of consumer credit has played a dominant role in making asset-ownership possible for persons in middle and lower income levels is apparent. The practice of instalment buying in the nineteenth century was not regarded by the community as socially respectable and was largely limited to home furnishings, sewing machines, and pianos.²¹ Not until the advent of mass production techniques in the automobile industry created pressure for greater markets did instalment purchasing come into its own. From less than one billion dollars in 1918, the amount of consumer credit outstanding rose to over three billion in 1929, and this amount had doubled by 1941. The post-war boom occasioned a jump in consumer credit to \$14.7 billion in 1950, and \$33.7 billion in 1959.²²

The common-law rules adjusting the rights of the parties to the conditional sale contract were clearly inadequate to regulate the burgeoning retail instalment sales business. Law in this economic arena became vastly too important to leave to judges, and contract therapy was prescribed by lawyers representing sales finance companies and conditional buyers. The result was one of the most devastating legal documents ever written—the conditional sale form contract.²³

To a surprising degree one can talk of a standard, industry-wide conditional sale contract. The uniformity of these agreements is remarkable in the face of the incredible volume of conditional sales and the diversity of their subject matter. Some variation results from divergence in local law; then, too, conditional sale contracts tend to become somewhat more detailed when goods of greater value are covered.

In the usual conditional sale contract, the seller's right to act against the buyer is conditioned on the happening of a wide assortment of events having some bearing on the buyer's ability to perform the contract, commencing with the obvious—such as the buyer's failure to pay an instalment or his insolvency—and concluding with the extreme—such as "where for any other reason seller should deem himself insecure." Upon the occurrence of any one of these events, the full amount of the purchase price then remaining unpaid becomes due at the option of the

²¹ For a historical treatment of the growth of instalment credit, see *FEDERAL RESERVE REPORT* pt. I, vol. 1, at 22-24 (1957).

²² 45 *FED. RESERVE BULL.* 422 (1959). This figure is for the month of February.

²³ "Before the passage of the [Uniform Conditional Sales Act], the usual conditional sales contract in its provisions closely resembled the famous agreement between Shylock and Antonio." *Street v. Commercial Credit Co.*, 35 *Ariz.* 479, 486, 281 *Pac.* 46, 48 (1929).

seller, who may then repossess the article by self-help, using reasonable force, or by legal process. The repossessing seller may retain all payments previously made by the buyer as compensation for the latter's use of the article. The seller is given the right to resell at private or public sale. The proceeds of the resale shall be applied to expenses incurred in retaking and reselling the property, including payment of attorney's fees, the remainder must be applied to payment of the balance due under the contract, with any surplus paid to the buyer. The buyer agrees to pay any deficiency remaining after application of the proceeds of the resale to the unpaid balance. The doctrine of election of remedies is expressly abrogated, and the seller is allowed to sue or repossess, and the use of one remedy shall not bar the exercise of the other.²⁴

With the advent of the detailed form contract, the problem of damages between a conditional vendor and a defaulting buyer became largely a matter of the extent to which a court would intervene in the private agreement-making process to assert judicial conceptions of community policy. Almost invariably the remedy brought against the defaulting buyer by the seller was set forth in the form contract and, therefore, one already agreed to by the buyer. It then lay with the courts to determine whether the provisions of the contract should be enforced, or whether they were so inimical to community values as to merit the fatal accolade: "void as against public policy."

It is fair to generalize that, in construing instalment contracts, courts have usually refused to heed Maitland's perceptive admonition: "If there is to be any law at all, contract must be taught to know its place."²⁵ In this area courts have, by and large, been content to echo Holmes nineteenth-century observation: "The contract is carefully drawn, so far as to make clear that the vendors intended to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it."²⁶

Occasionally courts rebelled against the one-sidedness of the form conditional sale contracts. Some, in direct defiance of contract terms, reasserted the doctrine of exclusiveness of remedy, thereby depriving

²⁴ This summary is based on the composite form set out in 2 CONDIT. SALE—CHAT. MORT. REP. 19,011.

²⁵ 2 POLLOCK & MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 233 (2d ed. 1905).

²⁶ *White v. Solomon*, 164 Mass. 516, 518, 42 N.E. 104-05 (1894). "However we may deplore the folly of the defendant of entering into such a contract or the unbounded avarice of the plaintiff who would enforce it to such an extent, we cannot see our way clear to relieve the defendant from the burden of his deliberately assumed obligation." *International Harvester Co. v. Bauer*, 82 Ore. 686, 692, 162 Pac. 856, 858 (1917).

repossessing sellers of deficiency decrees.²⁷ Others could not abide the harshness of forfeiture clauses and refused to enforce them.²⁸ None the less, industry self-regulation by contract was, on the whole, accomplished.²⁹ Courts generally acceded to it, and the very existence of contract terms specifically setting forth the legal consequences of default could not but deter many parties from bringing their causes to the courts. By subscribing to the view that commercial contracts are sacrosanct, judges to a great extent ceded regulation of the vital instalment buying process to the sellers and financiers who invariably prepare retail instalment contracts, reserving the right to intervene only in cases where their jurisdiction was invoked in matters of force, fraud, egregious overreaching, and in those rare instances where a problem arose regarding the rights of parties which was not covered by the terms of the instalment sale agreement.

The reluctance of courts to intervene effectively to protect consumers in instalment buying is doubtless attributable to the traditional belief that competent parties are free to contract and that their agreements are to be enforced as written. Freedom of contract is a phrase with an inspiring ring, but it sounds as a dull clang in an area where there is no true equality of bargaining power between parties. It is fair to state that even in the highly competitive automobile and appliance markets the instalment buyer does lack equal bargaining power in the sense of being able to demand a contract that will safeguard his best interests in the transaction. It is well known that dealers will negotiate on price, often through the allowance to be made on the trade-in. But they will stand firm on requiring the instalment buyer to sign the form contract—usually one prepared by the sales finance company or commercial bank maintaining a continuing relationship with the dealer. After the parties have reached agreement on price, the buyer is presented with the contract to sign as something of a formality to be gotten out of the way. This document, often printed in unconscionably small type, is sometimes not even identified as a conditional sale contract but is

²⁷ See, *e.g.*, *Noble Gill Pontiac v. Bassett*, 227 Ark. 211, 297 S.W.2d 658 (1957); *General Motors Corp. v. Driver*, 188 Ark. 88, 64 S.W.2d 87 (1933); *James v. Allen*, 23 Cal. App. 2d 205, 72 P.2d 570 (1937); *Perkins v. Brobбен*, 116 Mich. 172, 74 N.W. 469 (1898); *Singer v. Millard*, 171 Wis. 637, 177 N.W. 893 (1920).

²⁸ See, *e.g.*, *Thomas v. Philip Werlein Ltd.*, 181 La. 104, 158 So. 635 (1935). See also *National Cash Register Co. v. Hude*, 119 Miss. 36, 80 So. 378 (1919) (forfeiture clause not applicable where goods proved defective).

²⁹ The following cases enforce forfeiture clauses: *Minan v. Story & Clark Piano Co.*, 213 Mich. 397, 181 N.W. 1017 (1921); *Pfeiffer v. Norman*, 22 N.D. 168, 133 N.W. 97 (1911); *Lynch v. Sable-Oberteuffer-Peterson*, 122 Ore. 597, 260 Pac. 222 (1927). The following cases enforce clauses allowing seller to hold buyer for deficiency after resale: *Jeanson v. Zangel*, 119 Cal. App. 692, 7 P.2d 314 (1932); *Horvitz v. Leibowitz*, 274 Ill. App. 196 (1934); *Osgood Co. v. Wilkinson*, 265 N.Y. 70, 191 N.E. 779 (1934); *Haubelt v. Bryan & Doyle*, 43 P.2d 68 (Okla. 1935); *International Harvester Co. v. Bauer*, 82 Ore. 686, 162 Pac. 856 (1917).

labeled the "Easy Payment Plan" or with some other euphemism. The seller may confidently anticipate that the buyer will either fail to read the contract at all or will not understand it if he does wade through it. Even if the buyer were the *rara avis* who would read the contract, and even if he were somehow able to comprehend the avalanche of legal consequences that would greet any default on his part, his prudence would avail him little. If he wants to buy an automobile or appliance "on time," he must sign one retail instalment contract or the other and they are, short of statutory regulation, uniformly drawn to give virtually every advantage to the seller and to any subsequent transferee of the paper. In short, the instalment buyer has precious little freedom of contract; he is, in fact, confronted with an industry-wide monolith. Any theories of construction of instalment contracts should be viewed against this background.

The fact that the standard conditional sale contract is one-sided should not, however, be taken to indicate that dealers and financiers are congenitally malignant of heart. Their justification for employing what appears to be a very harsh contract is a persuasive one. Mass production of consumer goods requires mass distribution, and no one would deny that instalment financiers have played a decisive role in the great post-war boom in retail sales. By broadening the base of consumer credit to include practically everyone with a steady income, these financial institutions have made possible a standard of living in this country that is the envy of the world. However, in doing so, they have taken tremendous risks in lengthening debt maturities and dropping down-payment requirements to levels that would have seemed perilous two decades ago. One who hazards his capital in financing the retail instalment sales of new automobiles on the basis of a thirty-six month contract maturity with a twenty-five per cent down-payment carries an obligation that at times may exceed the value of the security. Such a businessman is not abashed to buttress his admittedly shaky position with a contract giving him extreme remedies contingent upon some form of consumer default. His ready rationale for such a contractual club is that it will only be used on purchasers so perverse and intractable as to deserve such treatment, and, doubtless, reputable businessmen use it only in such cases.

Should the community accept this answer and leave protection of the retail instalment buyer a matter for the business ethics of sellers and finance agencies? The abuses in retail financing in the post-war years have taught that consumer protection must rest on something more solid than scout's honor.³⁰ Since the courts have been unwilling to follow

³⁰ See, e.g., Mabley, *How Car Gyps Wheel 'n' Deal*, Chicago Daily News, April 21, 1959, p. 6, col. 1: "A young man who works for a Chicago newspaper recently bought a 1951 used Plymouth priced at \$325 from [name of seller]. He turned in a '50 Ford and was credited with a \$50 down payment. This left a balance due of \$284.75, with tax. He signed papers and took the car. He was buying the car on time. Shortly afterwards he received his finance papers from

Maitland's suggestion and teach contract to know its place, legislative intervention is necessary.

STATUTORY CONTROL OF CONDITIONAL SALES DAMAGES

Legislative regulation of the rights of parties upon default by the conditional vendee has assumed such varied forms in the different states as to render comparative commentary of these statutes difficult. However, some statutory patterns are readily observable. The Uniform Conditional Sales Act (UCSA),³¹ first approved for adoption in 1918, contains comprehensive regulation of the whole area of the consequences of default in conditional sales. The UCSA is presently in effect in twelve states,³² though in 1943 it was withdrawn from the active list of Uniform Acts by the National Conference of Commissioners on Uniform State Laws pending preparation of the Uniform Commercial Code (UCC).³³ The UCC, now enacted in Connecticut, Kentucky, Massachusetts and Pennsylvania, supplants the UCSA as the measure offered by the National Conference of Commissioners on Uniform State Laws as the comprehensive act in this area.³⁴

The third major source of statutory regulation has been the retail instalment sales acts. That this kind of statute is of comparatively recent origin is shown by the fact that, although the pioneer laws of this type were enacted in Indiana and Wisconsin in 1935, the great bulk of these

[name of financier]. He owed a total of \$715.68. Listed under 'Finance Charge, Insurance Premiums, and Other Benefits' was the sum of \$430.93. The only discernible 'benefit' was one year's fire and theft coverage at \$8. The simple interest on the deal, therefore, amounted to 139 per cent." In *Commercial Credit Corp. v. Biagi*, 11 Ill. App. 2d 80, 136 N.E.2d 580 (1956), the court upheld a clause wherein a buyer waived all defenses against the assignee of the note and contract. This harsh clause is now contained in virtually all Illinois retail instalment sales contracts and has the effect of making the assignee of the note and contract a holder in due course even though he may not have complied with the requirements of UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52.

³¹ Citations to the Uniform Conditional Sales Act in this article will be to the original section numbers of the act as it appears in 2 UNIFORM LAWS ANN.

³² Alaska (1919), Arizona (1920), Delaware (1919), Hawaii (modified form) (1942), Indiana (1935), New Hampshire (1945), New Jersey (1919), New York (1922), Pennsylvania (modified form) (1925), South Dakota (1919), West Virginia (1925), and Wisconsin. Pennsylvania re-adopted the UCSA in a materially altered form in 1956 to be applied only to conditional sales made prior to July, 1954, the date the Uniform Commercial Code became effective there. See 2 UNIFORM LAWS ANN. 6 (Supp. 1958).

³³ In withdrawing the act in 1943 the Commissioners noted that it needed to be substantially revised in the light of developments in instalment credit and financing practices. HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 67 (1943).

³⁴ See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, CONNECTICUT ENACTS THE UNIFORM COMMERCIAL CODE (1959). The code will go into effect in Kentucky on July 1, 1960, and in Connecticut on October 1, 1961. *Id.* at 9.

statutes were concomitants of the post-war boom in retail financing. By 1950, eleven states, in addition to the two mentioned, had enacted similar measures, and from 1950 to 1956 five other jurisdictions followed. The banner year of 1957 saw no less than nine states pass statutes, and in 1958 three more states fell into line.³⁵ All of these acts regulate credit sales of motor vehicles, but only six cover other consumer goods as well. Several of these statutes require licensing of sales finance companies. Many place statutory limits on finance charges, and all require full disclosure of all essential facts in the sales transaction: cash price, down payment, finance charge, and insurance fees. Provisions regulating insurance practices, requiring that buyers be given completed copies of contracts, assuring purchasers of proportionate refunds upon prepayment, limiting delinquency, collection, and refinancing charges, requiring receipts for cash payments, and forbidding certain unfair clauses are commonly found in the various acts.

The retail instalment sales acts are obviously consumer protection measures, and with the threat of abuse to purchasers inherent in the process of the seller's foreclosure of the buyer's interest upon default, it would seem appropriate that these statutes regulate repossession, redemption, and resale of goods conditionally sold. Nonetheless, only the retail instalment sales acts of Connecticut,³⁶ Florida,³⁷ Illinois,³⁸ Maryland³⁹ and Michigan⁴⁰ extend protection to purchasers in these matters. Several of the other states having retail instalment sales legislation also have either the UCSA or the UCC covering repossession, redemption and resale. On the other hand, other states having retail instalment sales acts either do not regulate these matters at all or do so by miscellaneous statutes, varying in the comprehensiveness of their coverage. Still other states having neither the UCSA, the UCC, nor any form of retail instalment sales legislation have some statutory provisions setting forth the rights of the parties upon default by a conditional vendee.

Repossession

Under ordinary circumstances repossession of the chattel after default by the buyer is the last resort of the holder of the conditional sale contract. He avails himself of this harsh and cumbersome remedy only after he has failed to induce the delinquent purchaser to pay overdue

³⁵ For a listing of these statutes, see Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 YALE L.J. 839, 867 (1959).

³⁶ CONN. GEN. STAT. §§ 42-98 (1958). The Connecticut statute will presumably remain in effect until the effective date of the UCC in that state.

³⁷ FLA. STAT. ANN. § 520.11 (Supp. 1958).

³⁸ ILL. REV. STAT. ch. 121 ½, §§ 245-49 (1957).

³⁹ MD. ANN. CODE art. 83, §§ 141-48 (1957).

⁴⁰ MICH. STAT. ANN. §§ 23.628(23)-(27) (Supp. 1955).

obligations or to refinance the contract.⁴¹ His reluctance to retake possession of the chattel security is understandable. Selling an automobile or appliance once in the fierce competition of today's market place is difficult enough; the task of reselling an article tarnished by repossession is an uninviting one. This is particularly true in view of the fact that most conditional sale paper is purchased from dealers by financial institutions—sales finance companies or commercial banks—which are ill-equipped to market used merchandise. On the contrary, circumstances can arise which impel the holder of the contract toward quick seizure of the chattel security, as where there is a threat of the defaulting buyer's absconding or where his financial position has seriously deteriorated.

The right of the holder of the contract to retake possession upon default of the buyer either by self-help or under legal process is invariably set forth in the contract. The typical statutory limitation on such a contract provision is that of the UCSA, stating that the seller may resume possession without legal process only if he can do so without a breach of the peace.⁴² The UCC allows the secured party the right of repossession unless the security agreement provides otherwise and follows the UCSA in permitting repossession without judicial process only when the retaking can be accomplished without breach of the peace.⁴³

Notice Prior to Repossession

Several jurisdictions provide that if the holder of the contract notifies the buyer of his intention to retake due to the buyer's default, the buyer loses any right to redeem the property subsequently unless he performs his obligations before the time set for repossession.⁴⁴ The

⁴¹ See FEDERAL RESERVE REPORT pt. I, vol. 1, at 75. This survey of actual business practices notes that repossession is usually resorted to only after the customer has received a series of notices. Sellers and financiers are particularly reluctant to repossess appliances because of their low resale value and because of the bad publicity incurred in having to enter the buyer's home to retake the article.

⁴² UNIFORM CONDITIONAL SALES ACT § 16. For similar provisions see CONN. GEN. STAT. § 42-98(a) (1958); FLA. STAT. ANN. § 520.11(1) (Supp. 1958); MD. ANN. CODE art. 83, § 141(a) (1957); MICH. STAT. ANN. § 23.628(23a) (Supp. 1955); OHIO REV. CODE § 1319.19 (1953). The Montana statute, MONT. REV. CODES ANN. § 74-207 (1947), states two methods by which the seller may regain possession of property upon default of buyer: (a) he may maintain an action for "claim and delivery;" or, (b) he may insert in the contract a clause allowing the sheriff of the county to retake possession and sell. No provision is made in the Montana act relative to repossession by self-help.

⁴³ UNIFORM COMMERCIAL CODE § 9-503. Since in the case of heavy equipment, removal from the debtor's premises may be infeasible, Section 9-503 permits the secured party to render such equipment unusable and to dispose of the collateral on the debtor's premises.

⁴⁴ UNIFORM CONDITIONAL SALES ACT § 17; CONN. GEN. STAT. § 42-98(b) (1958); ILL. REV. STAT. ch. 121 ½, § 245 (1957); MINN. STAT. ANN. § 511.19(2) (Supp. 1958).

UCSA⁴⁵ and the Illinois statute⁴⁶ provide the notice is to be given not more than forty nor less than twenty days prior to the retaking, while the Connecticut⁴⁷ and Minnesota⁴⁸ acts require only ten day's notice. The rationale of these statutes is that the buyer is as well protected by a reasonable period prior to the date of repossession during which he can pay off his obligations as he is by a period of redemption after repossession. Since retaking involves a good bit of trouble and expense, the holder of the contract should have the right to keep the goods free of the buyer's right to redeem if he gives the buyer ample notice prior to the time set for retaking.⁴⁹

Whether the rights of defaulting buyers are properly safeguarded by statutes allowing a holder to cut off the buyer's right of redemption by prior notice is problematical. There is something to be said for the contention that although sophisticated buyers will strive to stave off repossession if notified of the imminence of the event, ill-informed vendees may well consider the notice of intent to retake as only one more of what has often been a series of duns and will not be galvanized into action until the repossession has occurred.⁵⁰ But then it is too late to save the chattel, and the notice that the buyer thought was only a further indignity heaped upon him by an unsympathetic holder has deprived him of his right to redeem his automobile or television and, thereby, has subjected his investment in the article to the probability of being washed out in the doleful process of resale. Significantly, the UCC does not allow the secured party to cut off the debtor's right to redeem by prior notice.⁵¹

Redemption

The assimilation of the conditional sale to a chattel mortgage with

⁴⁵ UNIFORM CONDITIONAL SALES ACT § 17.

⁴⁶ ILL. REV. STAT. ch. 121 1/2, § 245 (1957).

⁴⁷ CONN. GEN. STAT. § 42-98(b) (1958).

⁴⁸ MINN. STAT. ANN. § 511.19(2) (Supp. 1958).

⁴⁹ See Commissioners' Note, UNIFORM CONDITIONAL SALES ACT § 17, 2 UNIFORM LAWS ANN. 28 (1922).

⁵⁰ In describing collection procedures, it is said: "The usual practice is to send customers a series of notices which begin with a mild reminder and conclude with a stern admonition that the entire account is due and must be paid immediately to avoid serious legal consequences." FEDERAL RESERVE REPORT pt. I, vol. 1, at p. 75. In Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L. Q. 38, 62-63 (1958), the author criticizes the UCSA on notice prior to repossession on the ground that statutes should not deprive a defaulting buyer of his right of redemption on the basis of a notice the significance of which an uninformed buyer might be unable to appreciate.

⁵¹ The Maryland statute attaches a different consequence to notice of intent to retake. It provides that upon redemption the buyer is not obliged to pay the expenses of retaking and storing the goods unless the holder gives him notice ten days prior to repossession stating the intended date of retaking and the nature of the buyer's rights upon retaking. MD. ANN. CODE art. 83, § 141(b) (1957).

the consequent grant to the buyer of a right of redemption after repossession was one of the chief reforms of the UCSA. Under that statute a seller who has failed to give prior notice of an intention to retake must hold the goods for ten days after repossession during which time the buyer may redeem.⁵² The ten-day period established by the UCSA was thought to impose little hardship on the seller while offering the buyer ample time to raise the necessary funds to retrieve the goods.⁵³ The trend in other jurisdictions has been to lengthen the redemption period,⁵⁴ and the UCC allows redemption at any time before the secured party has disposed of the collateral or has contracted to do so.⁵⁵

How much must the defaulting purchaser pay to redeem his chattel? The UCSA requires "payment or tender of the amount due

⁵² UNIFORM CONDITIONAL SALES ACT § 18.

⁵³ Commissioners' Note, UNIFORM CONDITIONAL SALES ACT § 18, 2 UNIFORM LAWS ANN. 29-30 (1922).

⁵⁴ ILL. REV. STAT. ch. 121 $\frac{1}{2}$, § 246 (1957), and MINN. STAT. ANN. § 511.19(2) (Supp. 1958) (covering goods other than motor vehicles) adopt the ten-day period. CONN. GEN. STAT. § 42-98(c) (1958); MD. ANN. CODE art. 83, § 142 (1957); MICH. STAT. ANN. § 23.628(25) (Supp. 1955); and N.D. REV. CODE § 28-29071 (Supp. 1953), adopt a fifteen-day time limit, commencing, in the case of Maryland and Michigan, after the date the holder mails a notice to the buyer detailing the financial details of the repossession. Under the Minnesota Statute, MINN. STAT. ANN. § 511.195 (Supp. 1958), in the case of motor vehicles a thirty-day term is established if the buyer has paid in fifty per cent of the original price at the time of repossession. The Nebraska act, NEB. REV. STAT. § 69-301 (1950), is similar in granting a twenty-day interval if one-third of the purchase price has been paid upon retaking.

⁵⁵ UNIFORM COMMERCIAL CODE § 9-506. TENN. CODE ANN. § 47-1302 (1956), and VT. REV. STAT. § 2779 (1947), allow redemption until the time of sale. What is the effect under the UCSA of tender after the expiration of the ten-day period but before the goods are resold? In Bogert, *Commentaries on Conditional Sales*, 2A UNIFORM LAWS ANN. 157 (1924), the following observation is made: "The Uniform Act does not expressly cover the case of a tender of performance by the buyer after the expiration of the ten day redemption period, but before the day set for the resale of the goods. The notice of resale is not required to state that the goods will be resold on a given date, unless the buyer sooner pays the balance due and interest and expenses, and therein the Uniform Act differs from the statute in force in New York before Sept. 1, 1922. However, it would seem highly probable that courts having equitable powers would hold that a tender of performance before the day set for the resale, although after the expiration of the statutory period for redemption, would make it the duty of the seller to accept such tender and allow the buyer to take back the goods. It would surely be inequitable to allow the seller, after such tender, to proceed with the foreclosure sale and pile up costs and compel the buyer to run the risk of having his equity wiped out by a sale at a sacrifice." In *Schnitzer v. Fruehauf Trailer Company*, 283 App. Div. 421, 128 N.Y.S.2d 242, *aff'd*, 307 N.Y. 876, 122 N.E.2d 754 (1954), the court held that a conditional seller could not properly reject a tender made by an assignee of the conditional buyer after the expiration of the ten-day redemption period but before sale. The language from the *Commentaries on Conditional Sales* set out above was quoted and expressly followed.

under the contract at the time of retaking and interest" plus payment of the "expenses of retaking, keeping and storage."⁵⁶ No provision is made in the UCSA regarding the buyer's obligation to reimburse the holder for attorney's fees.

1. Effect of Acceleration Clause

The acceleration clause, omnipresent in modern retail instalment contracts or accompanying promissory notes, presents a problem in the application of the UCSA redemption provision.⁵⁷ Due to the acceleration clause, whether operative automatically or at the option of the holder, the entire unpaid balance of the contract is invariably due at the time of repossession of a chattel by a holder acting under the typical retail instalment contract. Hence, the question becomes: Can the defaulting buyer redeem his property by paying only the amount of delinquent instalments, or do the words of the statute "amount due under the contract at the time of retaking" require him to tender the entire unpaid balance of the purchase price? Despite the fact that the whole of the unpaid balance is clearly "due" at the time of retaking if there is an acceleration clause, the judicial interpretation of this section has uniformly been that the buyer may redeem his chattel upon payment of the instalments which would have been delinquent at the time of retaking without the operation of an acceleration provision.⁵⁸ This construction of the statute is bolstered by the provision in UCSA Section 18 that after the buyer has paid the requisite amount to redeem the goods he is entitled to recover "possession of them and to continue in the performance of the contract as if no default had occurred." The assumption made in the opinions is that if the presence of an acceleration clause were construed to require payment of the entire unpaid balance to redeem property, the clause allowing the buyer to continue in performance of the contract after redemption would be meaningless, for the contract would have been completed by the buyer's full payment. Hence, the courts state that they have adopted the above-mentioned construction in furtherance of the canon of legislative interpretation

⁵⁶ UNIFORM CONDITIONAL SALES ACT § 18.

⁵⁷ A typical acceleration clause follows: "In case default be made in and of said payments or any part thereof, or in case the holder hereof deems said indebtedness or any part thereof insecure, the holder of this note shall have the right at said holder's option to declare the whole balance of this note then remaining unpaid to be at once due and payable without any demand on or notice to the maker." 2 CONDIT. SALE—CHAT. MORT. REP. 19,105.

⁵⁸ The first decision on this point remains the leading case. *Street v. Commercial Credit Co.*, 35 Ariz. 479, 281 Pac. 46, 67 A.L.R. 1549 (1929). See also *Commercial Credit Co. v. Street*, 37 Ariz. 204, 291 Pac. 1003 (1930), to the same effect. *Accord*, *Harlee v. Federal Finance Corp.*, 152 Atl. 596 (Del. Super. Ct. 1930); *Clark v. Tri-State Discount Co.*, 151 Misc. 679, 271 N.Y.Supp. 779 (Sup. Ct. 1934); *Cox v. General Motors Acceptance Corp.*, 59 S.D. 585, 241 N.W. 609 (1932).

which requires effect to be given to each provision of the statute.⁵⁹ A possible alternative construction is that the provision allowing the buyer to continue in the performance of the contract after redemption is applicable only in those instances where no acceleration clause is present, for it is quite possible that at the time of writing the statute in 1918 the draftsmen did not anticipate the present ubiquity of acceleration clauses.

In holding that under UCSA Section 18 a buyer may redeem upon payment of the amount which would have been due at the time of repossession as though there had been no acceleration clause, the courts have unquestionably been influenced by a belief that a contrary interpretation would frustrate the purpose of the statute. It is asserted that the statute in granting the buyer a right to redeem only if he can quickly raise the entire unpaid balance of the contract is affording the buyer an empty remedy, for if he is so strapped as to be overdue in his instalment payments he is unlikely to be able to produce the remainder of the contract price in a ten-day period.⁶⁰

Post-UCSA legislation has varied sharply on the effect of an acceleration clause. Maryland has expressly provided that a buyer may redeem by paying the amount due at the time of redemption without giving effect to the acceleration clause.⁶¹ Two of the recent retail instalment sales acts contain language so similar to that of UCSA Section 18 as to have perpetuated the mild ambiguity inherent in that measure.⁶² Contrariwise, an unequivocal requirement that the buyer must disgorge the entire amount of the unpaid balance as a condition

⁵⁹ "If we construe the first phrase [buyer may redeem 'upon payment or tender of the amount due under the contract at the time of retaking'] as meaning the entire amount required to complete the payments and pass title, then it would seem the last phrase ['continue in the performance of the contract as if no default had occurred'] has no meaning or effect, for payment of the full price completes the contract, and there is nothing further for the buyer to perform. If on the other hand we consider the first phrase as meaning the instalments then due in the absence of an acceleration clause, the last phrase is given full force and effect, for the buyer on redemption has a 'further performance of the contract' incumbent on him, and he is in the precise situation as if no default had occurred." *Street v. Commercial Credit Co.*, 35 Ariz. 479, 485, 281 Pac. 46, 48, 67 A.L.R. 1549 (1929). This view is adopted in *Clark v. Tri-State Discount Co.*, 151 Misc. 679, 271 N.Y.Supp. 779 (Sup. Ct. 1934).

⁶⁰ This position is taken in *Street v. Commercial Credit Co.*, 35 Ariz. 479, 281 Pac. 46, 67 A.L.R. 1549 (1929); *Harlee v. Federal Finance Corp.*, 152 Atl. 596 (Del. Super. Ct. 1930); *Clark v. Tri-State Discount Co.*, 151 Misc. 679 (Sup. Ct. 1934).

⁶¹ MD. ANN. CODE art. 83, § 142 (1957).

⁶² CONN. GEN. STAT. § 42-98(c) (1958); ILL. REV. STAT. ch. 121 ½, § 246 (1957). See VT. REV. STAT. § 2779 (1947) where procedure for foreclosure of the conditional seller's lien resembles foreclosure of a chattel mortgage and the statute states: "If the property is not redeemed by payment of the amount due . . . the property shall be sold as posted."

of redemption has been adopted by four other states⁶³ and by the UCC.⁶⁴ It is conjectural why the UCC and other jurisdictions of like persuasion departed from the policy position which was so appealing to courts construing the UCSA—to the effect that allowing the buyer to redeem only if he is able to pay the entire balance due is of no substantial benefit to him. A possible explanation for the UCC view is that, realistically appraised, repossession is a last-ditch measure, relied on only after attempts at refinancing and renegotiation have proved futile. At this juncture the holder is justified in maintaining that the buyer has forfeited his right to further credit; hence, the repossessing holder is entitled to keep the chattel until the buyer can fully discharge the contract.⁶⁵

2. Expenses of Retaking and Attorney's Fees

The UCSA requirement that the buyer seeking to redeem must accompany his tender of the amount due under the contract with a sum covering "expenses of retaking, keeping, and storage" of the repossessed chattel⁶⁶ has set the pattern for subsequent legislation.⁶⁷ A minor

⁶³ MICH. STAT. ANN. § 23.628(25) (Supp. 1955); MINN. STAT. ANN. § 511.19(3) (Supp. 1958) ("If the then owner of the contract so elects and the contract so provides, the buyer may be required to pay the entire balance of the purchase price. . . ."); NEB. REV. STAT. § 69-301 (1950); N.D. REV. CODE § 28-29071 (Supp. 1953) (similar to Minnesota wording). The Michigan statute (Section 24) allows a repossessing holder at his option to reinstate the contract with a defaulting buyer if the buyer pays all past due instalments or makes other mutually satisfactory arrangements. But under Section 25 the buyer can redeem as a matter of right only upon payment of the unpaid time balance. See also TENN. CODE ANN. § 47-1302 (1956).

⁶⁴ UNIFORM COMMERCIAL CODE § 9-506 states that the buyer may redeem by "tendering fulfillment of all obligations secured by the collateral." The comment to this section says: "The debtor must tender fulfillment of all obligations secured . . . if the agreement contains a clause accelerating the entire balance due on default in one instalment, the entire balance would have to be tendered."

⁶⁵ Query: is this view sound unless the buyer is assured of adequate notice before repossession? Under the UCC no such notice is required, but standard business practice is to send a series of notices. See FEDERAL RESERVE REPORT pt. I, vol. 1, at 75.

⁶⁶ UNIFORM CONDITIONAL SALES ACT § 18.

⁶⁷ CONN. GEN. STAT. § 42-98(c) (1958) ("actual and reasonable expenses of any retaking and storing"); ILL. REV. STAT. ch. 121 ½, § 246 (1957) ("any expenses of taking, keeping and storage"); MD. ANN. CODE art. 83, § 142 (1957) ("actual and reasonable expenses of retaking and storing"); MICH. STAT. ANN. § 23.628(25) (Supp. 1955) ("costs of retaking, repairing, repossessing and storing"); MINN. STAT. ANN. § 511.19(3) (Supp. 1958) ("all costs and expenses of the retaking"); NEB. REV. STAT. § 69-301 (1950) ("reasonable cost of taking and keeping the same"); N.D. REV. CODE § 28-29071 (Supp. 1953) ("all costs and expenses of the retaking"); VT. REV. STAT. § 2779 (1947) ("costs and expenses incurred by such breach of condition"); UNIFORM COMMERCIAL CODE § 9-506 ("expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale. . .").

refinement that has found its way into several of the recent statutes and the UCC is the statement that a redeeming buyer need only pay "reasonable" expenses.⁶⁸ Under some statutes the obligation of the buyer to pay the expenses of repossession and storage has been conditioned on certain conduct of the holder of the contract. Hence, in Michigan the buyer is excused from paying the expenses of retaking when the seller repossessed within fifteen days after default.⁶⁹ In Illinois,⁷⁰ Maryland⁷¹ and New York⁷² the buyer's obligation to pay expenses arises only if the holder has given the buyer notice of intent to repossess a given number of days before the retaking. On the other hand, in Nebraska the buyer's conduct can excuse him from the duty of paying expenses upon repossession, for in that state if the buyer surrenders the chattel to the holder without legal process no costs are chargeable to the buyer upon redemption.⁷³

If legal process is used to retake a chattel, a major element of the holder's expense of repossession will be legal expenses, including attorney's fees. The UCSA and the subsequent retail instalment sales acts are silent on whether a buyer must pay legal fees incident to repossession as a condition of redemption. What scant authority exists suggests that legal costs may be recoverable either under the general statutory provision relating to "expenses of retaking"⁷⁴ or under a clause

⁶⁸ See statutes cited note 67 *supra* for Connecticut, Maryland, Nebraska and the UCC.

⁶⁹ MICH. STAT. ANN. § 23.628(25) (Supp. 1955).

⁷⁰ ILL. REV. STAT. ch. 121 ½, § 246 (1957) (notice "stating buyer's default" must be given to buyer at least five days before the default).

⁷¹ MD. ANN. CODE art. 83, § 141 (1957) (notice ten days before repossession stating: intent to repossess, time of intended repossession, and buyer's rights in case the goods are repossessed).

⁷² N.Y. PERS. PROP. LAW § 78 (same as notice required in Illinois statute note 70 *supra*).

⁷³ NEB. REV. STAT. § 69-301 (1950).

⁷⁴ See *Triple Cities Construction Corp. v. Byers Machine Co.*, 172 Misc. 519, 15 N.Y.S.2d 89 (1939), *rev'd*, 259 App. Div. 451, 19 N.Y.S.2d 709, *appeal denied*, 259 App. Div. 955, 20 N.Y.S.2d 844 (1940). The court said: "While property sold under a conditional sales agreement may at times be retaken without resort to legal process, there are times when such process is necessary. Moreover, there are circumstances which would undoubtedly justify a seller in seeking the advice and guidance of counsel as to his right to seize the property and the method by which such right ought to be exercised. This would be particularly true where there is a dispute concerning the subject matter of the sale, the terms of the agreement, or where negotiations are carried on with regard to a compromise of some of the terms of sale. It is unreasonable to assume that the legislative intent envisaged the statute as self-executing, or that all laymen would be sufficiently acquainted with the intricacies of legal precedent and construction to properly determine their rights in connection therewith. We think, therefore, that a reasonable fee for services of counsel may be justly and properly included under many conditions incident to the act of repossession." 259 App. Div. at 452, 19 N.Y.S.2d at 710. The court in this case believed the contract clause covering attorney's fees to be superfluous.

in the contract specifically granting the holder a right to demand legal expenses upon redemption.⁷⁵ It is questionable whether the general provision common to conditional sale contracts subjecting the buyer to liability for payment of attorney's fees upon default adequately covers this situation.⁷⁶ With commendable clarity, the UCC sets forth reasonable attorney's fees and legal expenses, to the extent provided in the agreement and not prohibited by law, as a part of the obligation a buyer must meet to redeem his chattel.⁷⁷

Resale

After redemption, the right of resale constitutes the second major statutory reform devised to relieve the buyer of the consequences of the harsh common-law rule allowing forfeiture of the buyer's interest upon repossession. Pre-UCSA examples of statutory regulations designed to avoid forfeiture fell into three patterns. First, Missouri and Ohio adopted the most direct approach to the prevention of forfeiture in providing that the seller could not retake goods upon default unless he restored to the buyer the sum already paid in by the buyer, less the reasonable value of the use of the property.⁷⁸ Second, in Massachusetts and Pennsylvania a buyer had the option of demanding a resale and was entitled to any surplus existing after the proceeds had been applied to payment of the unpaid balance of the contract price and the expenses of repossession and resale.⁷⁹ In the third class of jurisdictions, New York and Tennessee, resale was compulsory, and the seller was under an obligation to resell after repossession and to return to the buyer the excess over the unpaid contract price and expenses of the retaking and resale of the chattel.⁸⁰

⁷⁵ In *Reimer v. Sheets*, 149 N.E.2d 554 (Ind. App. 1958), the court, although it found no clause specifically authorizing the holder's recovery of attorney's fees upon redemption, indicated that it would enforce such a clause if it were present.

⁷⁶ The clauses referring to attorney's fees in *Reimer v. Sheets*, *supra* note 75, applied only when the holder repossessed and resold and sued for a deficiency or when he sued for the unpaid price.

⁷⁷ UNIFORM COMMERCIAL CODE § 9-506.

⁷⁸ Commissioners' Note, 2 UNIFORM LAWS ANN. 32 (1922). Neither Missouri nor Ohio has adopted the UCSA and both have retained these provisions. MO. ANN. STAT. § 428.110 (1952) states that it shall be unlawful for the vendor to retake possession without refunding to the buyer the money paid in less reasonable compensation for the use of the property which shall not exceed twenty-five per cent of the amount so paid. OHIO REV. CODE § 1319.14 (1953) provides that where the buyer has paid in over twenty-five per cent of the contract price before default, the holder may not retake without restoring the money paid in after deducting reasonable compensation for the use of the property, not exceeding fifty per cent of the amount paid.

⁷⁹ Commissioners' Note, 2 UNIFORM LAWS ANN. 32 (1922). Both Massachusetts (MASS. ANN. LAWS ch. 106, §§ 1-101 to 9-507 (1958)) and Pennsylvania (PA. STAT. ANN. tit. 12A §§ 1-101 to 3-806 (1954)) have since adopted the UCC.

⁸⁰ Commissioners' Note, 2 UNIFORM LAWS ANN. 32 (1922). New York (N.Y. PERS. PROP. LAW §§ 60-80) has since adopted the UCSA. Tennessee did not adopt the UCSA and has retained this statute. TENN. CODE ANN. §§ 47-1302 to 47-1307 (1956).

The draftsmen of the UCSA chose to adopt the compulsory resale approach in the belief that only an automatic provision would extend adequate protection to defaulting consumers. The commissioners explained their action in these words:

Many buyers of goods on conditional sale contracts are men of small means, little versed in the law and unfamiliar with correct business methods. They will not, it is believed, be apt to take advantage of an optional resale provision. They will not ordinarily know of it. It may be said that, if they are careless with respect to their own rights, they do not deserve protection. But the answer is that they frequently will not know what their rights are, that they are a class of buyers who are frequently very needy and ignorant.⁸¹

Under the UCSA, however, the seller's duty to resell becomes obligatory only in instances where the buyer has paid in at least fifty percent of the purchase price at the time of retaking.⁸² In such a case, the seller must sell the repossessed article at public sale,⁸³ within thirty days after retaking⁸⁴ and upon ten days' notice of intent to sell.⁸⁵ If

⁸¹ Commissioners' Note, 2 UNIFORM LAWS ANN. 33 (1922).

⁸² UNIFORM CONDITIONAL SALES ACT § 19.

⁸³ *Ibid.* Section 19 expressly allows the seller to bid for the goods at the resale. In *Bulldog Concrete Forms Sales Corp. v. Taylor*, 195 F.2d 417 (7th Cir. 1952), the court held that, where due publicity had been given, a sale in a lawyer's office would comply with the statutory requirement of a public sale. "For the validity of a 'public sale' to meet the requirements of the Act, it is only necessary, so far as the place is concerned, that the sale be held in a place which is accessible to those invited to attend. . . ." 195 F.2d at 426.

⁸⁴ *Indiana* (IND. ANN. STAT. § 58-817 (1957 Replacement Vol.)) and *New York* (N.Y. PERS. PROP. LAW § 79) have amended UNIFORM CONDITIONAL SALES ACT § 19 to provide that where the seller takes possession of the goods by legal process, the seller may hold such goods for a period not to exceed thirty days after entry of judgment entitling seller to possession of the goods before holding a resale.

⁸⁵ "The purpose of the notice is to inform prospective bidders of the sale in order to secure a good price for the article to be sold and also to apprise the conditional vendee of it in order to enable him to protect his interests by buying in the article or by working up interest in the sale. . . ." *Commercial Credit Corp. v. Lawley*, 135 A.2d 546, 549 (N.J. Super. 1958). The majority interpretation of the interrelationship of the ten-day redemption period and the ten-day notice period of Section 19 is that they may run concurrently; hence, the ten-day notice of resale may be given during the redemption period. See *Plainfield Motor Co. v. Salamon*, 13 N.J. Misc. 570, 180 Atl. 428 (1935); *Eisenberg v. Commercial Credit Corp.*, 267 N.Y. 80, 195 N.E. 691 (1935); *Fisk Discount Corp. v. Brooklyn Taxicab Trans. Co.*, 270 App. Div. 491, 60 N.Y.2d 453 (1946); *Commercial Credit Corp. v. Ornstein*, 245 App. Div. 815, 281 N.Y.Supp. 321 (1935); *Strickland v. Hare & Chase, Inc.*, 217 App. Div. 196, 216 N.Y.Supp. 506 (1926); *Commercial Credit Corp. v. Goldberg*, 130 Misc. 597, 224 N.Y.Supp. 177 (Sup. Ct. 1927). *Contra*, *Uptown Transp. Corp. v. Fisk Discount Corp.*, 150 Misc. 829, 270 N.Y.Supp. 273 (Sup. Ct. 1934). What is the effect of the seller's failure to comply with statutory requirements regarding notice of sale and time and place of sale? One effect is that the seller loses his right to hold the buyer on a deficiency judgment for any

the buyer has not paid at least fifty per cent of the purchase price at the time of retaking, the seller is under no duty to sell unless the buyer requests resale by notice within ten days after retaking.⁸⁶ The principle of compulsory resale is receded from by the UCSA where less than fifty per cent of the price has been paid for the reason that in such cases depreciation has often consumed the buyer's equity. If resale is of no utility to the buyer in this situation, so the commissioners reasoned, the seller should not be obliged to go through this troublesome and expensive ritual unless the buyer so desires.⁸⁷ UCSA Sections 21 and 22 order the proceeds of resale be allocated to the expenses of resale, retaking and storing the goods, and to satisfaction of the balance due under the contract. Any surplus shall be paid to the buyer;⁸⁸ any deficiency shall be recoverable from the buyer or his successors in interest.⁸⁹ Where the seller is under no duty to resell, he may either (1) retain the goods without obligation to account to the buyer and the buyer is discharged of all his undertakings under the contract;⁹⁰ or (2) voluntarily resell under the formalities prescribed by Section 19.⁹¹ If he chooses the

balance due after resale. See *Oneida Nat. Bank & Trust Co. v. Manikas*, 10 Misc. 2d 671, 175 N.Y.S.2d 612 (1958) (voluntary resale under Section 20); *Circle B Motors, Inc. v. Reilly*, 7 Misc. 2d 71, 169 N.Y.S.2d 582 (1958); *Carter v. Brockway Motor Co.*, 158 Misc. 558, 285 N.Y.Supp. 64 (1935) (voluntary resale under Section 20); *Ellner v. Commercial Credit Corp.*, 137 Misc. 251, 242 N.Y.Supp. 720 (1930) (voluntary resale under Section 20); *Capitol Dist. L.A.W. Corp. v. Blake*, 136 Misc. 651, 241 N.Y.Supp. 476 (1930) (voluntary resale under Section 20); *West Virginia Mack Sales Co. v. Brown*, 139 W. Va. 667, 81 S.E.2d 103 (1954) (*S* sold in his own right several months after repossession). See also *Bulldog Concrete Forms Sales Corp. v. Taylor*, 195 F.2d 417 (7th Cir. 1952). A second consequence of the seller's violation of the statute is that he is subject to a damage suit by the buyer for conversion. *Berge v. Yellow Mfg. Acceptance Corp.*, 57 S.D. 306, 232 N.W. 45 (1930). See also *UNIFORM CONDITIONAL SALES ACT* § 25.

⁸⁶ *UNIFORM CONDITIONAL SALES ACT* § 20.

⁸⁷ Commissioners' Note, 2 *UNIFORM LAWS ANN.* 34 (1922).

⁸⁸ See *Sturman v. Polito*, 161 Misc. 536, 291 N.Y.Supp. 621 (1936), where a contract provision stating that upon default all sums paid in are forfeited was held to be void as against public policy.

⁸⁹ Seller is not entitled to the deficiency unless he has resold the chattel in compliance with requirements of the statute. See *Goldberg v. Aronowsky*, 248 App. Div. 915, 290 N.Y.Supp. 777 (1937), and cases cited note 44 *supra*.

⁹⁰ *UNIFORM CONDITIONAL SALES ACT* § 23. If the seller is under no obligation to make a compulsory resale within Sections 19 or 20, he may do anything he wishes with the goods, including selling them, but he has no right to a deficiency judgment against the buyer unless he complies with the statutory requirements regarding voluntary resale. See note 48 *supra*.

⁹¹ *UNIFORM CONDITIONAL SALES ACT* § 20. Despite the wording of Section 20 to the effect that when one voluntarily resells he must comply with the "same requirements" as set forth in Section 19, the courts have held that the provisions of Sections 19 and 20 requiring resale within thirty days of repossession do not apply to a voluntary resale; hence, the seller need only resell within a reasonable time after repossession. *Stark & Son v. Licastro*, 127 N.J.L. 380, 22 A.2d 768 (1941); *In re White Allom & Charles Roberson of London, Inc.*, 253 App. Div. 220,

latter course of action he may hold the buyer for any resulting deficiency.⁹²

The common-law rules regarding election of remedies are modified by UCSA Section 24 which specifically gives the seller a right to sue for a deficiency after retaking and resale; moreover, the seller may re-take goods after bringing an action for the price or recovering a judgment in such action. UCSA Section 25 grants to the buyer the right to recover from his seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, where the seller has violated the provisions of the statute relative to redemption and resale.⁹³ The buyer's actual damages where the seller failed to make a proper resale have been measured by deducting the balance due on the contract from the value of the chattel at the time the seller retook it and allowing the buyer the difference.⁹⁴

Only two of the states enacting retail instalment sales legislation—Connecticut⁹⁵ and Florida⁹⁶—have adopted the UCSA's two cardinal principles of consumer protection in resale regulation: that resales of the goods of a defaulting buyer should be both compulsory and automatic. Each of these states has retained the UCSA's provision making compulsory resale conditional upon the buyer's payment of more than fifty per cent of the purchase price. Maryland has a similar requirement, but departs from the UCSA pattern by conditioning the seller's duty to resell upon the buyer's written request that the goods be resold.⁹⁷ In answer to the belief of the draftsmen of the UCSA that resale to be worthwhile must be automatic lest ignorance deprive the unwary buyer

1 N.Y.Supp. 715 (1938); *Central Acceptance Corp. v. Massey*, 107 W. Va. 503, 148 S.E. 864 (1929).

⁹² *Bulldog Concrete Forms Sales Corp. v. Taylor*, 195 F.2d 417 (7th Cir. 1952). See also cases cited note 44 *supra* wherein courts held that seller conducting voluntary resale lost his right to sue for deficiency by reason of his failure to meet the requirements of the statute regarding notice or time and place of sale.

⁹³ For cases construing Section 25, see *Harlee v. Federal Finance Corp.*, 160 Atl. 906 (Del. Super. 1932); *Autocar Sales & Service Co. v. Hansen*, 270 N.Y. 414, 1 N.E.2d 830 (1936); *Sheeley Bros. v. International Harvester Co.*, 243 App. Div. 831, 278 N.Y.Supp. 134 (1935); *LaRocca Builders, Inc. v. Sanders*, 230 App. Div. 594, 245 N.Y.Supp. 262 (1930); *Manhattan Taxi Service Corp. v. Checker Cab Mfg. Co.*, 226 App. Div. 624, 236 N.Y.Supp. 559 (1929); *U.S. Taxi Corp. v. Mogul Finance Corp.*, 140 Misc. 386, 250 N.Y.Supp. 549 (1931).

⁹⁴ *Fisher v. Stewart Motor Corp.*, 132 Misc. 225, 228 N.Y.Supp. 549 (1928) (truck selling for \$2,275 found to be worth \$1,550 at time of seizure nine months later; buyer given \$684 after deducting balance due on contract, \$866, from value of truck); *Berge v. Yellow Mfg. Acceptance Corp.*, 57 S.D. 306, 232 N.W. 45 (1930) (truck selling for \$2,619 held worth \$1,700 at time of retaking; buyer allowed \$932 in damages after deducting balance due on contract, \$768, from value of truck and adding interest).

⁹⁵ CONN. GEN. STAT. § 42-98(d) (1958).

⁹⁶ FLA. STAT. ANN. § 520.11 (Supp. 1958).

⁹⁷ MD. ANN. CODE art. 83, § 143 (1957).

of his statutory protection, the Maryland act requires the seller to give the buyer full notice of his rights regarding resale within five days after repossession.⁹⁸

Michigan⁹⁹ and Illinois¹⁰⁰ have abandoned compulsory resale in their retail instalment sales legislation and have radically departed from the UCSA approach to the function of resale as a device for consumer protection. The Michigan statute states that if a repossessed vehicle is not redeemed by the buyer, he "shall forfeit all claim to such motor vehicle . . . and the repossessed motor vehicle *may* then be sold. . . ."¹⁰¹ However, in cases where less than \$2,000 is financed and the buyer has paid in an amount equal to eighty per cent or more of the time balance at the time of his default, the seller must, within five days after repossession, elect either (1) to retain the vehicle and release the buyer from further obligation under the contract, or (2) return the vehicle to the buyer at the seller's expense and be limited to an action to recover the balance of the indebtedness.¹⁰² This statute is not a model of lucidity. Manifestly, where the eighty per cent clause does not apply, the seller "may" resell and seek a deficiency; but what if he does not choose to resell? Can he elect to treat the vehicle as his own, forfeit the buyer's payments, and release the buyer from further liability? The literal import of the statute, due to the use of the word "may" in the portion of the statute quoted above, seems to favor this construction.¹⁰³ The Illinois measure is obviously patterned after the Michigan act, but clarifies the issue left obscure in the Michigan statute in providing that "the holder may retain the goods or at his election resell the goods. If the holder does not resell the goods within a reasonable time after retaking, he shall be deemed to have elected to retain the goods and release the buyer from any further obligations under the contract."¹⁰⁴ It is questionable whether either the Michigan or Illinois statute provides any effective protection against forfeiture of the buyer's interest.¹⁰⁵

⁹⁸ MD. ANN. CODE art. 83 § 141 (1957).

⁹⁹ MICH. STAT. ANN. §§ 23.628(26)-(27) (Supp. 1955).

¹⁰⁰ ILL. REV. STAT. ch. 121 ½, §§ 247-49 (1957).

¹⁰¹ MICH. STAT. ANN. § 23.628(26) (Supp. 1955).

¹⁰² MICH. STAT. ANN. § 23.628(27) (Supp. 1955).

¹⁰³ THE BIENNIAL REPORT OF THE ATTORNEY GENERAL OF MICHIGAN No. 1525 470, 473 (1952) seems to lend credence to this view. See Cudlip & Tindall, *The Michigan Motor Vehicle Sales Finance Act*, 31 MICH. B.J. 14, 25 (1952).

¹⁰⁴ ILL. REV. STAT. ch. 121 ½, § 247.

¹⁰⁵ See Britton & Ulrich, *The Illinois Retail Installment Sales Act—Historical Background and Comparative Legislation*, 53 NW. U.L. REV. 137, 166 (1958), where the following statement is made regarding the Illinois statute: "There is no provision for compulsory resale except that if there is no sale within a reasonable time the buyer is released from further obligation. The result is that if the buyer fails to redeem the holder may both retain the buyer's payments and forfeit his interest in the goods, but only by releasing the buyer from further obligation."

The conviction that a buyer with a substantial equity is entitled as a matter of right to compulsory resale has guided the draftsmen of the UCC in providing that if a buyer of consumer goods has paid sixty per cent of the cash price the repossessing seller must resell.¹⁰⁶ On the supposition that if less than sixty per cent of the price has been paid in, the parties are often better off without resale, the code allows a holder in such cases to notify the buyer that he wishes to retain the repossessed goods in full satisfaction of the obligation, and, unless the buyer objects in writing within thirty days, the holder may thus avoid resale.¹⁰⁷

1. Mode and Time of Resale

The UCSA procedure for resale was obviously modeled on the somewhat rigid, formal procedure for foreclosure of chattel mortgages.¹⁰⁸ The sale must be public; at least three notices must be posted in different public places; if at the time of taking more than \$500 has been paid on the purchase price, newspaper publication of the notice is prescribed. The sale must be held within thirty days after the re-taking.¹⁰⁹ Three of the new statutes depart radically from the UCSA in allowing the private sale of repossessed goods as an alternative to the public sale.¹¹⁰ The buyer's interest in having the goods sold at a reasonable price—sometimes thought to be in jeopardy when the resale is private—is secured in some of these statutes by a provision to the effect that the reasonableness of a resale price may be judicially determined in any action brought by the seller for a deficiency judgment. After such determination, the seller is allowed to recover only the difference between the balance owing by the buyer and the reasonable or actual resale

¹⁰⁶ UNIFORM COMMERCIAL CODE § 9-505(1).

¹⁰⁷ UNIFORM COMMERCIAL CODE § 9-505(2).

¹⁰⁸ "It was the intention of the draftsmen of the Act to provide in Sections 19 to 23 a foreclosure sale system, for the purpose of protecting the equity of the conditional buyer and insuring the return to him of such proportion of his part payments as are equitably due him. In taking such action with respect to conditional sales the authors of the Uniform Act were but following the precedent set with respect to the companion credit device, the chattel mortgage." Bogert, *Commentaries on Conditional Sales*, 2A UNIFORM LAWS ANN. 159 (1924).

¹⁰⁹ UNIFORM CONDITIONAL SALES ACT § 19. In referring to a provision in the old New York statute allowing sixty days for resale, the following is said: "This seems a needlessly long period. It is believed that, if the buyer does not redeem the goods, the seller should be allowed to dispose of the matter by resale as soon as he can do so with due regard to protection of the buyer's rights. Ten days after the period of redemption has expired seems long enough in which to advertise the resale." Commissioners' Note, 2 UNIFORM LAWS ANN. 33 (1922).

¹¹⁰ CONN. GEN. STAT. § 42-98(d) (1958); FLA. STAT. ANN. § 520.11 (Supp. 1958); ILL. REV. STAT. ch. 121 ½, § 247. Maryland and Michigan still require public sale. MD. ANN. CODE art. 83, § 143 (1957); MICH. STAT. ANN. § 23.628(26) (Supp. 1955).

price, whichever is greater.¹¹¹ Moreover, the UCC allows the extended period of ninety days for the holder to resell the goods.¹¹²

CONCLUSION

The problem of adjusting by damages and other remedies the competing claims of sellers, finance companies and buyers upon default by the buyer of a conditional sale contract is exasperatingly difficult to solve. The variations in these cases as to who the parties are and what they are claiming are infinite. The kinds of defaulting buyers run the gamut from the hardened "skip artist" to the innocent gull who should never have been extended credit in the first place. One can assume that the vast majority of sellers and financial institutions are honest, for they cannot, in response to social pressures, if for no other reason, afford to be otherwise; nevertheless, the files of the "better business bureaus" bulge with tales of their misdeeds.¹¹³

The reputable seller or finance company desires to carry a defaulting seller as long as there is reasonable hope of his performing the contract; they abhor the inconvenience and red-tape inherent in repossession and resale, for which the finance companies and banks are so ill-equipped.¹¹⁴ These businessmen might well resent cumbersome, expensive statutory controls limiting their ability to protect their investment adequately in those cases where they do encounter a defaulting buyer intransigent in his refusal to pay or beyond hope in his financial ability to perform. These sellers would probably not think it immoral or dishonest to employ, in the absence of statute, a harsh conditional sale contract designed to give every possible advantage to the seller, for they would temper their use of this agreement with discretion and would call upon the extreme remedies in such a contract only when they were justified. But not all sellers or financiers have proved to be honest, and in the cut-throat competition of retail selling, the temptation to take

¹¹¹ CONN. GEN. STAT. § 42-98(d), (g) (1958); ILL. REV. STAT. ch. 121 ½, § 249 (1957); MICH. STAT. ANN. § 23.628(27) (Supp. 1955).

¹¹² UNIFORM COMMERCIAL CODE § 9-505(1).

¹¹³ Besides the abuses in repossession to be recounted below, finance charge "packing," credit life insurance, and "balloon" notes constitute some of the current matters for concern in the conduct of retail instalment sales. For a discussion of "packing," see WIS. STATE BANKING COMM'N & INTERIM ADVISORY LEGISLATIVE COMM. TO INVESTIGATE FINANCE COMPANIES, REPORT 33-38 (1935); Note, *Is Control of Dealer Participation a Necessary Adjunct to Regulation of Installment Sales Financing?* 28 IND. L.J. 641 (1953); General Motors Acceptance Corp. v. Comm'r. of Banks, 258 Wis. 56, 59, 45 N.W.2d 83, 85 (1950). For a discussion of possible abuses of credit life insurance, see Larson, *Problems of State Regulation*, 1957 INS. L.J. 376; Mors, *Small Loan Laws & Credit Insurance*, 1954 INS. L.J. 778. Relative to the vices of balloon notes, see Donaldson, *An Analysis of Retail Installment Sales Legislation*, 19 ROCKY MT. L. REV. 135, 144 (1947).

¹¹⁴ "Repossessions . . . may be viewed as a last resort to the solution of delinquency." FEDERAL RESERVE REPORT pt. I, vol. 1, at 78. See also note 41 *supra*.

advantage of the unwary consumer must be tantalizing.¹¹⁵ The social and economic pressures that force most retailers to hew to the line of rectitude are not always present. Certainly there are urban areas where a seller can do a flourishing business for an indeterminate period of time with no need ever to deal with a customer a second time.¹¹⁶ One need not always sell integrity to stay in business.

¹¹⁵ From the personal experiences of one who was allowed to accompany a repossession crew in a large Midwestern city, the following is quoted: "If the buyer defaults on the contract, and there is no way to realize anything more on the debt, the seller will repossess the merchandise. Though the law says one may not repossess by self help if a breach of the peace will result, this presents no hindrance to this seller; for he simply pays no attention to it. For example, a buyer was in default on a home freezer. We went to his house, which was above a brick garage, at 1:30 a.m. The husband and wife were awakened, and immediately the men I was with began to remove the door to the house and to disconnect a gas line to a stove which had to be removed in order to get the freezer out. The five children who were asleep were transferred to another bed because it was necessary to turn the bed on its side to remove the freezer. The entire repossession took only twenty-five minutes even though the vendee kept protesting and screaming. In another case we went to a home on Saturday morning to repossess a couch. The woman, about eight months pregnant, violently objected to our presence, and in no uncertain terms told us to get out. We paid no attention to her, and the other man with us began removing the couch until the woman's husband came out of the bedroom pointing a gun at us. Through a good deal of fast talking we got out of there alive, and believe it or not, the husband ended up helping us carry it out, though his wife was quite sad about the matter. To repay the vendee for pulling the gun on us, the man in charge of the repossession told the others to put the couch in the empty lot next to the buyer's apartment, and then he proceeded to burn the merchandise in front of the vendee. In this case only forty dollars remained unpaid on the couch so there was no loss to the vendor. But if the couch were resold pursuant to the Installment Sales Act, there would have been surplus." Grossman, *Repossession as Related to Conditional Sales Contracts* (unpublished manuscript in Library of University of Illinois College of Law 1958).

¹¹⁶ "This writer spent three days in a credit furniture store watching the sales operation and going out on repossessions with the seller. The company financed its own paper and this made it possible for me to view the operation from the time of the sale to the dissolution of the buyer-seller relation which almost always took place after the buyer once dealt with this seller. The typical dealing was as follows: The buyer walked into the store and after showing interest in a phonograph for example, he was offered \$50 cash if he would buy this model. Because of the \$50 cash in hand, the buyer would generally agree to the purchase though the price seemed a little high. In one case the buyer purchased for \$250 a phonograph, costing the vendor slightly over \$100. The buyer stepped into an office with the salesman and signed a conditional sales contract and a wage assignment, both in pencil. The buyer's happiness after the purchase was to be shorter than he anticipated. A week later the buyer got a bill of sale and a coupon book. I was present when one such customer came in to complain about the bill of sale which stated that he was obligated to pay \$456 when he formerly agreed with the vendor to pay \$250. The vendee received no copy of the contract as required by the Retail Installment Sales Act, and moreover, the buyer signed the contract when all the spaces were entirely blank, also a violation of the statute. After the

The market place will continue to be one of the principal arenas of free society wherein a substantial portion of the public sits in constant judgment on the effectiveness of legal controls. There are few instances where the law more directly touches the masses than in the burgeoning area of retail instalment selling. The uninformed, oversold consumers who, in response to the pressures of social status and mass-media advertising, find themselves irretrievably overcommitted must be protected. Just so the seller and financier who make possible the present lofty standard of living by assuming the risks of advancing credit are worthy of effective legal assistance in safeguarding their legitimate interests. A balance must be struck between their competing interests, but how is this to be done?

The common law proved massively ineffectual in achieving the desired adjustment between the parties in this area. The doctrines of election of remedies and forfeiture of the buyer's interest upon default were found to be too arbitrary and inexact—as well as subject to too much abuse—to provide a practical solution to the problem of default in conditional sales. Nor has industry regulation by form contract been the answer, for it is dependent on an attitude of paternalism on the part of sellers toward their customers that cannot be expected to thrive in the hot competition of retail selling.

Legislative intervention—sustained, comprehensive legislation, as distinguished from the sporadic, fragmentary type—was needed. It came first in the form of Professor Bogert's UCSA. This grand old statute was a reaction to the chaos of judicial control of conditional sales and to the inequities of the conditional sale form contract—and the reaction was a violent one. The free-wheeling law of conditional

buyer left, the contract was filled out by the seller. The price inserted in the contract in this particular instance was \$325, and with finance charges for fifteen months it came to \$456. The seller was questioned on why his finance charge was over fifty per cent (agreed price-\$250). The seller told him he would have to wait until the contract could be obtained from the bank to find out where any possible mistake could be. The buyer was told not to do anything until he heard from the vendor. After the buyer left, the credit manager told me what would be done. The seller would do nothing on the contract, and since the buyer would not pay until hearing from the seller, he would be in default. After this, the seller will simply tie up the buyer's wages by sending a wage assignment to his employer. Incidentally, if the purchaser moved to a new job, the seller will simply erase the name of the old employer and insert the new one's name. This is one reason for having everything in pencil. The buyer then has only one recourse. He will have to come into the vendor's store and make payment in order to get a release of the wage assignment. Sometimes, when a purchaser defaults and comes in saying that the monthly payments are too large for him to meet, the seller will refinance the transaction. He will add up the old indebtedness, which includes the previously computed finance charge, put this on a new contract and add on another finance charge, telling the buyer that when the new contract is discounted at the bank, it will cost an additional interest charge." Grossman, *Repossession as Related to Conditional Sales Contracts* (unpublished manuscript in Library of University of Illinois College of Law 1958).

sales, wherein the conditional seller luxuriated in a legal climate of minimal judicial restraint, was pressed into the rigid mold of the chattel mortgage. Hence, upon default by the buyer, it was thought that the rights of the parties were best adjusted by adopting the formalized, if not stilted, procedure for foreclosing a chattel mortgage—compulsory resale, public in nature, within a short time after repossession; the forfeiture doctrine of the common law was swept away and the election of remedies rule was tamed. The result was that the defaulting buyer was overprotected, often to his detriment. Several of the new retail instalment sales statutes covering default adopted in general the UCSA format with a few improvements, such as allowing private resale as an alternative to public sale.¹¹⁷

Though it owes much to the UCSA, the UCC has introduced some bold innovations designed to bring the requirements of resale more into harmony with sound business practices and away from the inflexibilities of chattel mortgage procedures. Though the UCC retains compulsory resale, the buyer is allowed to renounce his right to it after default,¹¹⁸ while under the UCSA it was problematical whether a waiver without new consideration would be effective even after default.¹¹⁹ In place of the UCSA provision that an article be held at least ten days after repossession before resale,¹²⁰ the UCC requires only that reasonable notification of the intended sale be given so that the parties entitled to receive it will have sufficient time to take steps necessary to protect their interests.¹²¹ In contrast to the UCSA stipulation that resale must come not more than thirty days after repossession,¹²² the UCC abandons any set period except in the case of consumer goods which must be sold within ninety days.¹²³ This change is in accord with the policy of the UCC "to encourage disposition by private sale through regular commercial channels,"¹²⁴ in the belief that the interests of all parties are better safeguarded if the retailer is allowed to sell repossessed merchandise in the same manner as his other inventory, having the privilege of holding the goods a long enough period of time to take advantage of optimum market conditions. The only restrictions placed upon the secured party's method of resale by the UCC is that it must be commercially reasonable. The words of the code best show this attitude:

¹¹⁷ Others like the Michigan statute departed fundamentally from the UCSA pattern.

¹¹⁸ UNIFORM COMMERCIAL CODE § 9-505(1).

¹¹⁹ See, e.g., *Adler v. Weis & Fisher Co.*, 218 N.Y. 295, 119 N.E. 1049 (1916); *Laufer v. Burghand*, 146 Misc. 39, 261 N.Y.Supp. 364 (1932); *Fisher v. Stewart Motor Corp.*, 132 Misc. 225, 228 N.Y.Supp. 549 (1928); *Grossman v. Weiss*, 129 Misc. 234, 221 N.Y.Supp. 266 (1927).

¹²⁰ UNIFORM CONDITIONAL SALES ACT § 19.

¹²¹ UNIFORM COMMERCIAL CODE § 9-504(3).

¹²² UNIFORM CONDITIONAL SALES ACT § 19.

¹²³ UNIFORM COMMERCIAL CODE § 9-505(1).

¹²⁴ UNIFORM COMMERCIAL CODE § 9-504, comment 6.

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including method, manner, time, place and terms must be commercially reasonable.¹²⁵

If the secured party fails to employ commercially reasonable methods of resale, the UCC grants the buyer the right to recover actual loss or, in any event, not less than the finance charge plus ten per cent of the cash price.¹²⁶

The enormity of the scope and variation of human activities and attitudes encompassed by the problem of default in conditional sales renders effective legislative regulation of this seething spectrum of conflicting interests and demands a most challenging task. The UCC, though doubtless not free from fault, depending on the critic's own set of values, is by a wide margin the best piece of legislation in the area. With four adoptions of the UCC and increased agitation for its passage in several states, the code's solution of the default problem promises to be the law of the land within a generation.

¹²⁵ UNIFORM COMMERCIAL CODE § 9-504(3).

¹²⁶ UNIFORM COMMERCIAL CODE § 9-507(1).